

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN L. DICKENS,	§
	§
Defendant Below-	§ No. 425, 2010
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for Kent County
	§ Cr. ID 0906012589
Plaintiff Below-	§
Appellee.	§

Submitted: May 4, 2012
Decided: July 31, 2012

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

ORDER

This 31st day of July, upon consideration of the parties' briefs, their supplemental memoranda, and the record below, it appears to the Court that:

(1) Following a six day trial, a Superior Court jury convicted Kevin Dickens of two counts of Assault in a Detention Facility and acquitted him one count of Assault in a Detention Facility.¹ Upon motion by the State, the Superior Court declared Dickens to be a habitual offender and sentenced him to a total period of sixteen years at Level V incarceration to be followed by a six month term of probation. This is Dickens' direct appeal.

¹ Dickens requested, and was permitted, to represent himself at trial with the assistance of standby counsel. He continues to represent himself in this appeal.

(2) The evidence presented at trial fairly established that on March 28, 2009, Dickens was an inmate held in an isolated housing unit at the James T. Vaughn Correctional Center. Around 8:00 that morning, two correctional officers, Michael Bryan and Nicholas Mohr, were passing out supplies to inmates in Dickens' housing area. The officers approached Dickens' door and opened a flap in the cell door to pass supplies to Dickens. Dickens threw a mixture of feces and urine toward the open flap, striking both officers in their faces and on their shirts.² The officers reported the incident to their lieutenant, who then received authorization from his superiors to retrieve Dickens from his cell and place him in restraints for a 24-hour observation period. A Quick Response Team (QRT) was assembled and approached Dickens' cell. Dickens was asked to turn around and be handcuffed, but he refused to cooperate. When the cell door was open, Dickens resisted and attacked QRT members. Eventually, Dickens was subdued, placed in restraints, and put into an observation room. An examination of his cell after the incident revealed feces on the floor and feces wrapped in plastic and toilet paper in and around the sink and toilet.

² The officers testified that they had had no confrontation or exchange of words with Dickens that morning prior to his assault.

(3) Thereafter, on April 15, 2009, correctional officers were conducting random “shakedown” searches of cells on Dickens’ tier.³ As part of their standard operating procedure, the officers asked Dickens to turn around and be handcuffed while the officers conducted their search. Dickens refused to comply. Again, a QRT was assembled to respond to Dickens’ cell. Bryan was the first correctional officer through the cell door. Dickens began throwing punches and feces, striking Bryan and attempting to grab his throat and wrench his neck. Bryan received scratches and bruising to his neck and had feces smeared over the back of his head, neck and shirt. After Dickens was subdued and placed in observation, Bryan was seen by an outside doctor for the injuries he received during the incident. An examination of the cell after the incident revealed a mixture of urine, feces and toilet paper in the sink, as well as fecal matter on the walls and floor.

(4) At trial, Dickens called several witnesses and also took the stand in his own defense. Shortly after taking the stand, however, Dickens chose to remove himself from the courtroom for the remainder of the trial. The jury ultimately convicted Dickens of the March 28, 2009 assault on Mohr and the April 15, 2009 assault on Bryan. The jury acquitted Dickens of the March 28, 2009 assault charge on Bryan. Thereafter, the Superior Court declared Dickens to be a habitual

³ The testimony established that a shakedown search is a search of an inmate’s cell in order to monitor safety, sanitation and security in the cell. The searches are conducted during each shift, and the cells to be searched are randomly selected.

offender and sentenced him to sixteen years at Level V imprisonment followed by six months probation.

(5) Dickens enumerates nine issues in his opening brief on appeal. First, he contends that both the prosecution and the trial court violated his Eighth Amendment rights because, throughout the trial, they failed to respond to his claims of assault and intimidation by DOC personnel. Second, Dickens contends that the trial judge erred in failing to recuse himself because of an appearance of bias. Third, Dickens contends that the Superior Court erred in sentencing him as a habitual offender and in ordering him to pay restitution. Fourth, Dickens contends that the prosecutor engaged in misconduct. Fifth, Dickens asserts that the trial court abused its discretion by not allowing him to present evidence of his state of mind at the time of the offense. Sixth, Dickens contends that trial court abused its discretion by not requiring the prosecutor to articulate race-neutral reasons for using two of its peremptory challenges against black jurors. Seventh, Dickens argues that he was denied his right of self-representation and constructively denied his right to counsel. Eighth, Dickens argues that the trial court abused its discretion by making witnesses swear on a Bible before allowing them to testify and by not allowing Dickens to possess a Bible. Finally, Dickens contends that the Superior Court erred in denying his request for transcripts.

(6) Dickens' first argument is that he was subjected to cruel and unusual punishment during the course of the trial because the trial judge ignored his complaints about alleged mistreatment by prison officials. Dickens' reliance on the Eighth Amendment in this context is misplaced. The Eighth Amendment prohibits the infliction of "cruel and unusual punishment."⁴ Dickens' Eighth Amendment argument raises no complaint about his sentence, however, which was the punishment imposed by the Superior Court. In fact, Dickens is complaining about alleged pre-conviction behavior of prison personnel. This behavior is not associated with the punishment imposed by the Superior Court and thus is not a cognizable claim in this direct appeal from his criminal convictions and sentence.

(7) Next, Dickens contends that the Superior Court judge erred in failing to recuse himself upon Dickens' request. Dickens argues that the trial judge's bias is evidenced by: (i) Dickens' prior complaints about the judge in other cases; (ii) the judge's unfair rulings in the present case; (iii) the judge's lack of regard for Dickens' complaints about his safety; (iv) the judge's failure to provide Dickens with a Bible; and (v) the judge's familial relationship with the namesake of the prison where Dickens is incarcerated.

⁴ U.S. CONST. amend. VIII; DEL. CONST. art. I, § 11.

(8) In addressing a motion to recuse, a judge must engage in a two-step analysis to determine whether disqualification is appropriate.⁵ First, the judge must be satisfied as a subjective matter that the judge can proceed to hear the case without bias.⁶ Next, the judge must determine as an objective matter whether recusal is appropriate because of an appearance of bias sufficient to cast doubt on the judge's impartiality.⁷ In this case, the judge applied the two-part test and concluded that, subjectively, he had no bias for or against Dickens. The judge also found that the only arguable appearance of bias was based on the judge's adverse rulings in the case. Because the rulings were based upon the judge's application of the law and did not stem from any personal bias toward Dickens, the judge denied Dickens' motion for recusal. Under the circumstances, we find no abuse of discretion in the Superior Court's subjective analysis nor do we find any appearance of bias sufficient to cast doubt on the judge's impartiality. The trial court's adverse rulings simply form no valid basis for the judge's disqualification in this case.⁸

(9) Dickens next argues that the Superior Court erred in sentencing him as a habitual offender and in ordering him to pay restitution. In moving to declare a defendant to be a habitual offender under 11 Del. C. § 4214(a), the State must

⁵ *Jones v. State*, 940 A.2d 1, 18 (Del. 2007).

⁶ *Los v. Los*, 595 A.2d 381, 384-85 (Del. 1991).

⁷ *Id.* at 385.

⁸ *See In re Wittrock*, 649 A.2d 1053, 1054 (Del. 1994) (citing *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

establish that a defendant has three prior felony convictions and that the defendant had some chance of rehabilitation following sentencing on each prior conviction.⁹ “Some chance of rehabilitation” means only that some period of time must have elapsed between sentencing on a prior conviction and the commission of the offense resulting in the later conviction.¹⁰ In its supplemental memorandum, the State concedes that the Superior Court erred in granting its motion to declare Dickens to be a habitual offender because the offenses relied upon by the State overlapped, and Dickens did not have the requisite opportunity for rehabilitation between each of the offenses. Accordingly, it is clear that Dickens’ sentence must be vacated and this matter must be remanded for resentencing as a result of this error.¹¹ Given our remand for resentencing, we need not address Dickens’ other claims of sentencing errors.

(10) Dickens’ fourth claim on appeal is prosecutorial misconduct. According to Dickens, the State’s prosecution of him was malicious and was in retaliation for Dickens’ repeated complaints to authorities regarding Bryan’s abusive behavior. Dickens also alleges that the prosecutor in his case spread false

⁹ DEL. CODE ANN. tit. 11, § 4214(b) (2007).

¹⁰ *Kirby v. State*, 1999 WL 734743 (Del. Sept. 9, 1999) (citing *Hall v. State*, 473 A.2d 352, 357 (Del. 1984)).

¹¹ The State argues that Dickens still qualifies as a habitual offender because of other offenses in his criminal history that were not relied upon by the State in its habitual offender motion. We do not address this argument because the State did not raise it to the Superior Court in the first instance. *See* Del. Supr. Ct. R. 8 (2012).

and disparaging rumors about him in a 2008 case, which subsequently led State officials to conspire against him to seek retaliation.

(11) Dickens' allegations are pure speculation and conjecture. There is nothing in this record to substantiate his claim of defamation. Moreover, the evidence established probable cause to charge Dickens with assault in this case. As long as probable cause exists to believe an accused has committed a criminal offense defined by statute, the decision to prosecute and what charges to bring are matters within the prosecutor's discretion.¹² We find no malicious prosecution in this case.

(12) Dickens' fifth argument is that the Superior Court abused its discretion by not allowing him to present evidence of his state of mind at the time of the offense and by not allowing him to introduce portions of a State psychiatric report for purposes of impeachment. With respect to the latter issue, the Superior Court denied Dickens' request to admit the psychiatrist's report during Dickens' direct testimony on the grounds that it was inadmissible hearsay.¹³ The mental health evaluation had been prepared at the trial court's direction in order to determine Dickens' competency to stand trial and whether there was the possibility of a defense based on mental illness. Dickens sought to admit the report, even though the psychiatrist was not a witness at trial, in order to challenge the

¹² *Albury v. State*, 551 A.2d 53, 61 (Del. 1988).

¹³ Del. Unif. R. Evid. 801(c) (2012)

conclusion that he was not suffering from a cognizable mental illness at the time of the offenses. The trial court held that Dickens' hearsay statements to the psychiatrist could not be admitted during Dickens' direct testimony but might possibly be admissible if the State's cross-examination impliedly charged Dickens with recent fabrication.¹⁴ After a few moments on the stand, however, Dickens left the courtroom and chose to absent himself for the remainder of the trial. Under the circumstances, we find no error in the Superior Court's ruling that Dickens' statements to the court-appointed psychiatrist were inadmissible hearsay.

(13) With respect to "state of mind" evidence, the Superior Court had ruled that Dickens could only argue justification as a defense to the charges if the evidence showed that Dickens believed "that such force was immediately necessary for the purpose of protecting [himself] against the use of unlawful force by the other person *on the present occasion*."¹⁵ The evidence at trial, however, showed that Dickens' assaults were preemptive strikes on correctional officers who were lawfully performing their duties on the present occasion.¹⁶ Accordingly, we

¹⁴ *Id.* 801(d)(1)(B).

¹⁵ DEL. CODE ANN. tit. 11, § 464(a) (2007) (emphasis added).

¹⁶ *See id.* § 1254(a). Section 1254(a) defines the crime of Assault in a Detention Facility and provides: "(a) Any person who, being confined in a detention facility, intentionally causes physical injury to a correctional officer, other state employee of a detention facility acting in the lawful performance of duties, any other person confined in a detention facility or any other person at a detention facility or other place having custody of such person shall be guilty of a class D felony."

find no error in the Superior Court's ruling that Dickens' "state of mind" evidence was irrelevant.¹⁷

(14) Dickens next argues that the Superior Court erred in not requiring the State to articulate race-neutral reasons for using two of its peremptory challenges to strike African-American jurors in accordance with *Batson v. Kentucky*.¹⁸ To establish a *Batson* violation, the defendant must first make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. If the requisite showing has been made, then the State must offer a race-neutral reason for the juror strikes. Finally, the trial court must determine whether the defendant has sustained his burden of proving purposeful discrimination.¹⁹

(15) In this case, Dickens did not raise his *Batson* claim until the jury was seated and the trial was in its second day of testimony. In considering his belated objection, the Superior Court noted that during the seating of the first twelve jurors, the State struck one African-American male, one Caucasian female, and one Caucasian male. During the seating of the alternates, the State struck one African-American male. Thus, of the four peremptory challenges that it used, the State struck two African-American jurors and two Caucasian jurors. The final jury of twelve included seven African-American members. In light of these facts, the

¹⁷ See *Dickens v. State*, 2008 WL 880162 (Del. Apr. 2, 2008) (affirming the trial court's refusal to instruct the jury on the defense of justification).

¹⁸ 476 U.S. 79 (1986) (holding that the State must not exercise its peremptory challenges on the basis of race).

¹⁹ *Robertson v. State*, 630 A.2d 1084, 1089 (Del. 1993).

Superior Court denied Dickens' *Batson* claim on the ground that he had failed to make a prima facie showing that the prosecutor had exercised his peremptory challenges based on race.

(16) We agree. Contrary to Dickens' argument, the State is only required to offer a race-neutral reason for its peremptory strikes *if* the defendant first makes a prima facie showing that the challenges were based on race. The State did not, despite Dickens' contention, utilize its challenges to strike a disproportionate number of African-Americans from the jury. Based on the trial record, we find no relevant circumstances to support even an inference that the State used its challenges to exclude jurors based on race.²⁰ Accordingly, we find no merit to this claim.

(17) Dickens next claims that the Superior Court denied him the right to represent himself and also constructively denied him the right to counsel. Most of Dickens' specific complaints relate to his contention that the Superior Court denied him the right to present a defense by refusing to allow him to present evidence of prior abuse by the guards, which reflected on Dickens' state of mind at the time of the assaults. Dickens asserts in his opening brief that the trial court's "prohibition against any form of retaliation is unreasonable under a person's constitutional and human rights." We already have discussed the evidentiary standards necessary to

²⁰ See *Roberston v. State*, 630 A.2d at 1089.

establish a justification defense and ruled that a jury instruction on justification was not warranted because the evidence did not support a finding that Dickens' use of force was immediately necessary on the present occasion.²¹ Dickens' contention that retaliation should be a permissible defense is not supported by the law.

(18) Dickens also contends that he was denied his right to self-representation when the Superior Court refused to declare a mistrial due to inclement weather. According to Dickens, the Superior Court should have declared a mistrial as soon as the Governor of Delaware declared a state of emergency because of a snow storm. Dickens argues that no juror should have been required to report for trial due to the bad weather and that requiring the jurors to report under such unreasonable circumstances led to one sitting juror having to be replaced by the first alternate juror.

(19) We find no merit to this claim. A mistrial should only be declared when there are no practical or meaningful alternatives to that remedy.²² A mistrial due to bad weather obviously was not necessary in this case given that 11 out of the 12 jurors were able to report for duty. The Superior Court's decision to seat the first alternate juror in place of the one sitting juror who could not report was a reasonable alternative. Dickens makes no credible claim that replacement of one juror with an alternate juror denied him the right to self-representation in any way.

²¹ See DEL. CODE ANN. tit. 11, § 464(a) (2007).

²² *Bailey v. State*, 521 A.2d 1069, 1077 (Del. 1987).

(20) Dickens also contends that the Superior Court constructively denied him the right to counsel when it failed to appoint stand-by counsel to act on his behalf after Dickens voluntarily chose to leave the courtroom during the middle of his own testimony. We disagree. After Dickens announced his decision to leave, the Superior Court questioned him and was satisfied that the decision was made knowingly and voluntarily. The Superior Court handed Dickens a copy of the jury instructions and informed him that he could return to the courtroom any time he wished. Standby counsel remained for the prayer conference, the State's brief rebuttal, closing arguments, and the verdict. Dickens returned only for a juror's note. Under these circumstances, Dickens presents no credible claim that he was constructively denied his constitutional right to counsel.

(21) Dickens' eighth argument is that the Superior Court erred by requiring witnesses to swear on a Bible before testifying and also for refusing to provide him with a Bible to have during the course of the trial. With respect to the first issue, Delaware law requires that each witness, prior to testifying, must either swear on the Bible or declare and affirm the truthfulness of the witness' testimony.²³ If any witness refuses, as a non-Christian, to swear on the Bible, the witness is given the opportunity to be sworn according to the tenets of that witness' religion.²⁴ Dickens acknowledges that, in compliance with the statutory requirements, each witness in

²³ DEL. CODE ANN. tit. 10, §§ 5321-23 (2007).

²⁴ *Id.* § 5324.

his case was given the opportunity either to affirm the truthfulness of their testimony or to swear on the Bible prior to testifying. He contends, without citing any authority, that this method of swearing witnesses is unconstitutional. We find absolutely no merit to this suggestion given that the witnesses have the choice not to swear on a Bible. Moreover, Dickens cites no authority for his suggestion that the Superior Court violated his constitutional rights by failing to provide him with a copy of the Bible for his personal use throughout the trial. Accordingly, we reject this claim.

(22) Dickens' final argument on appeal is that the Superior Court abused its discretion in denying his request for transcripts at State expense. The record reflects that Dickens' received the trial transcript. His argument relates to the Superior Court's failure to specifically transcribe the sworn oath administered to each witness. He also argues that he should have been provided with a transcript of jury selection. In response to Dickens' supplemental motion for transcripts, the Superior Court deferred ruling on his request, indicating that Dickens needed to supplement his motion with the specific reasons he needed the requested transcripts. Dickens, however, failed to supplement his motion as instructed.

(23) Pursuant to Supreme Court Rule 9(e), in a class A felony, noncapital case, the Superior Court must direct the court reporter to prepare the transcript of the entire trial, *excluding* "opening and closing arguments of counsel and jury

selection.”²⁵ We find no abuse of the Superior Court’s discretion in deferring a ruling on Dickens’ motion for the transcript of jury selection until Dickens’ provided more information about the necessity of the transcript. Moreover, we find no error in the failure of the court reporters to transcribe the standard oath administered to each and every witness given our finding that administration of the standard, statutorily-mandated oath did not violate Dickens’ rights in any way.

NOW, THEREFORE, IT IS ORDERED that the sentencing order of the Superior Court is VACATED. The matter shall be REMANDED for resentencing. The judgment of the Superior Court is AFFIRMED in all other respects.

BY THE COURT:

/s/ Randy J. Holland
Justice

²⁵ Del. Supr. Ct. R. 9(e) (2012).